



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Jonathan Miller
Secretary

September 16, 2010

No. 10-20

Greg Sisson
Assistant Vice President – Claims
Underwriters Surety & Claims
1700 Eastpoint Parkway
P.O. Box 23640
Louisville, KY 40233

RE: Determination of Protest: RFP 790 1000000306 (Workers' Compensation Claims TPA).

Dear Mr. Sisson:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Underwriters Surety & Claims ("US&C") relating to RFP 790 1000000306 for Workers' Compensation Claims TPA Services (the "RFP").

FACTUAL BACKGROUND

The Personnel Cabinet issued the RFP (Amendment 5) on April 5, 2010. The RFP closed on April 13, 2010. US&C and Cannon Cochran Management Services, Inc. ("CCMSI") submitted proposals. An award was made to CCMSI on June 15, 2010. On June 29, 2010, US&C filed a written protest of the award. In its protest, US&C states:

The attached requests reconsideration of scoring based upon misunderstandings by the Personnel Cabinet regarding our responses and misapplication of the model procurement code. Most of our concerns are centered around the unusually high importance placed on outcomes reporting—to which we are able to provide the requested services. The Cabinet focused too extensively on this one area. Incorrect and sometimes unsubstantiated conclusions regarding the claim information & reporting system capabilities were made. Too often, the scoring was based on preferences and reporting convenience, instead of a comprehensive evaluation of capabilities. Procurement decisions are required to be determined on the basis of "best value" under KRS 45A.070(3). "Best value" means

that the decision "shall be based on objective and quantifiable criteria that shall include price." The price difference between CCMSI and US&C was scored correctly by the Cabinet's evaluators. The scoring on the other components of CCMSI and US&C were subjective, as described in our attached protest. All subjective differences between the CCMSI and US&C proposals not based on objective and quantifiable criteria directly violate KRS 45A.070(3). All such subjective differences between the two bids should be eliminated.

While the definition of "best value" is not incorporated in the personal service contract statutes, the definitions in KRS 45A.690 also include the "requirements of any other law necessary to make the personal service contract or memorandum of agreement valid." KRS 45A.690(2). The subjective and unquantifiable determinations by the evaluators "constituted arbitrary and capricious action under the procedural and substantive due process clauses of the Kentucky Constitution (Section 2) and the United States Constitution." *Laboratory Corp. America Holdings v. Rudolph*, 184 S.W. 3d 68 at p. 71, (Ky. App. 2006).

On July 12, 2010, the Personnel Cabinet submitted a written response. For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, and other relevant information, the Secretary finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. US&C submitted a proposal in response to the RFP. Therefore, US&C has standing to protest the award of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, the award was posted on the e-Procurement website on June 15, 2010. The protest was received on June 29, 2010. The protest was filed within two calendar weeks and is, accordingly, timely.

In its written protest, US&C contends that its proposal offered "best value." In specific, US&C states that it offered the lowest fee and offered the same or better service as the awarded proposal.

This RFP was for a "Personal Service Contract." KRS 45A.695. A Personal Service Contract ("PSC") is a contract by which an individual or entity "is to perform certain services requiring professional skill or professional judgment for a specified period of time at a price agreed upon." KRS 45A.690 (1)(f). An award of a PSC is to be made to the "best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation." KRS 45A.695(5). The PSC RFP evaluation and award process involves agency *discretion*. As a result, a protest to an agency award of a PSC RFP will be reviewed by the arbitrary, capricious, or contrary to law standard. See *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Thus, the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not "substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the award must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

US&C points to numerous sections of the RFP which it contends were evaluated in a subjective manner. US&C is incorrect that this was a "best value" procurement. "Best value" is a factor in the evaluation of sealed bids. KRS 45A.080(2). An award of competitive sealed bid should be made to the responsible, responsive bidder whose bid offers a pre-defined "best value." KRS 45A.080(5). This was an RFP for a Personal Service Contract. An award of a Personal Service Contract is to be made to the "best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation." KRS 45A.695(5).

A Personal Service Contract award is a discretionary act by an agency. *See Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). The limits of discretion are not boundless, however; agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). Yet, there is a presumption of correctness in agency's decisions. KRS 45A.280.

A review of every claim made by US&C's protest indicates that US&C disagrees with the Personnel Cabinet's evaluation. Every claim basically contends that the Personnel Cabinet did not evaluate correctly and assign an appropriate score to the US&C proposal. The Personnel Cabinet response contends that all of the scores were justified and supported by the record. The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not "substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable." *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664

(1983). The Secretary finds that US&C has not overcome the presumption of correctness and has not shown that the award was arbitrary, capricious, or contrary to law.

In response to one area (Underwriter's protest, page 16, section (e)), US&C' concedes that it failed to provide information required by the RFP. In its protest, US&C makes a request to the Secretary that it be allowed to substitute a revised response pursuant to 200 KAR 5:306(3). This request should have been made – and was not – at the agency level. The Secretary's function under KRS 45A is to review an agency's determinations. On this issue, there is no agency determination to review.

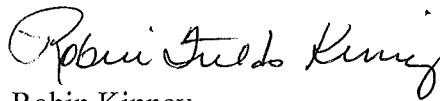
Further, US&C is required to establish the existence of prejudice. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996). The Secretary finds that Underwriter has not established that it was prejudiced in the evaluation of the solicitation.

Accordingly, upon review of the record, the protest of US&C lacks merit. US&C has not established prejudice. Further, the presumption of correctness in KRS 45A.280 applies and US&C has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Walter Gaffield, Personnel Cabinet